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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 MICHAEL SUBLETT,

7 Petitioner,

8 v.

9 DONALD R. HOLBROOK,

10 Respondent.

CASE NO. C17-5672 BHS

ORDER ADOPTING IN PART
AND MODIFYING IN PART
REPORT AND
RECOMMENDATION

11 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 14), and
12 Petitioner Michael Sublett’s (“Sublett”) objections to the R&R (Dkt. 15).
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14 On March 6, 2018, Judge Creatura issued the R&R recommending that the Court deny two of Sublett’s claims on the merits and dismiss the third claim as unexhausted and
15 procedurally barred. Dkt. 14. On March 19, 2018, Sublett filed objections. Dkt. 15.
16

17 The district judge must determine de novo any part of the magistrate judge’s disposition that has been properly objected to. The district judge may accept, reject, or
18 modify the recommended disposition; receive further evidence; or return the matter to the
19 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).
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21 In this case, the Court finds that some of Sublett’s objections have merit. First,
22 however, the Court agrees with Judge Creatura that Sublett’s ground for relief regarding

1 his counsel's failure to object to the prosecutor's closing argument is unexhausted and
2 procedurally barred. Dkt. 14 at 15. Moreover, Sublett does not object to this portion of
3 the R&R. Therefore, the Court adopts the R&R on this issue and dismisses this ground
4 for relief.

5 Second, one of Sublett's other grounds for relief is whether his right to a fair trial
6 was violated because he was fitted for a stun device during trial. The state court denied
7 the claim because Sublett failed to show prejudice. Dkt. 7, Exh. 28 at 4. The R&R
8 recommends denying the claim because there is no clearly established federal law on the
9 use of stun devices. Dkt. 14 at 9–12. Sublett objects arguing that numerous authorities
10 exist on the use of shackles and stun belts. Dkt. 15 at 2–4. Although these positions raise
11 an interesting question as to the specificity of the relevant rule, the Court need not
12 address this question. The state court adjudicated the claim on Sublett's failure to show
13 prejudice, and Sublett has failed to show that the decision was unreasonable. *See* Dkt. 1
14 (petition); Dkt. 10 (traverse). Thus, the Court modifies the recommendation and denies
15 the claim on the basis that Sublett has failed to show that the state court determination of
16 no prejudice is either contrary to or an unreasonable application of federal law. *See*,
17 *e.g.*, *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) ("if the challenged practice is not
18 found inherently prejudicial and if the defendant fails to show actual prejudice, the
19 inquiry is over.").¹

21 ¹ The Court is unaware of and Sublett has failed to cite any authority for the proposition that the
22 use of a stun device is inherently prejudicial, which could implicitly be the basis for the R&R's
recommendations on this issue.

1 Sublett also argues that he is not required to show prejudice on this issue because
2 the stun device interfered with his right to counsel. Dkt. 15 at 9. Sublett, however, relies
3 on authorities that addressed the trial court explicitly interfering with the defendant's
4 ability to communicate with counsel. For example, in *Geders v. United States*, 425 U.S.
5 80 (1976), the trial court ordered that defendant could not consult with his counsel during
6 an overnight recess. The Supreme Court concluded that this violated the defendant's
7 right to the assistance of counsel and required reversal without any showing of prejudice.
8 *Id.* at 91. Since *Geders*, the rule has evolved such that an "actual or constructive denial
9 of the assistance of counsel altogether is reversible without a showing of prejudice."
10 *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997). Under this rule, Sublett has
11 failed to show either an actual or constructive denial of counsel. In fact, the trial court
12 found as follows:

13 Mr. Sublett was able to assist his counsel at trial. They
14 communicated regularly during the trial, during recesses, and otherwise. He
15 and [his counsel] testified that they were seated approximately one foot
apart at the counsel table. Mr. Sublett wrote a number of notes to [his
counsel], and [counsel] read those notes.

16 Dkt. 9, Exh. 23 at 4, ¶ 4.2. In other words, the state appellate court relied on an
17 unchallenged finding of fact by the state trial court. In the absence of any argument that
18 this finding is an unreasonable determination of the facts in light of the record, this Court
19 is bound by this finding as well. 28 U.S.C. § 2254(e)(1) ("a determination of a factual
20 issue made by a State court shall be presumed to be correct. The applicant shall have the
21 burden of rebutting the presumption of correctness by clear and convincing evidence."").
22 Therefore, Sublett's argument on this issue misses the mark.

1 Finally, Sublett argues that his counsel was ineffective for failing to object to the
2 use of the stun device. Even if this failure fell below a reasonable standard of
3 representation, which Sublett has failed to establish, Sublett has failed to show any
4 prejudice. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) (the petitioner must
5 show that the deficient performance prejudiced his defense so as to “deprive the
6 defendant of a fair trial, a trial whose result is unreasonable.”). Therefore, the Court
7 having considered the R&R, Sublett’s objections, and the remaining record, does hereby
8 find and order as follows:

- 9 (1) The R&R is **ADOPTED in part** and **MODIFIED in part**;
- 10 (2) Sublett’s claim for ineffective assistance based on his counsel’s failure to
11 object to the prosecutor’s closing argument is **DISMISSED** as unexhausted
12 and procedurally barred;
- 13 (3) Sublett’s other claims are **DENIED** on the merits;
- 14 (4) A Certificate of Appealability is **DENIED**; and
- 15 (5) The Clerk shall enter a **JUDGMENT** and close the case.

16 Dated this 23rd day of April, 2018.

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19 BENJAMIN H. SETTLE
20 United States District Judge
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